

Mercer Law Review

Volume 27
Number 1 *Annual Survey of Georgia Law*

Article 13

12-1975

Remedies

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Recommended Citation

Simpson, Ralph F. (1975) "Remedies," *Mercer Law Review*. Vol. 27 : No. 1 , Article 13.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol27/iss1/13

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REMEDIES

By RALPH F. SIMPSON*

I. NO-FAULT INSURANCE

The Georgia legislature produced the long awaited "no fault" insurance law to be known as the Georgia Motor Vehicle Accident Reparations Act.¹ The Act requires insurance coverage as a condition precedent to the operation of a motor vehicle which is required to be registered in the state of Georgia.² Upon implementation and regulation this may well be one of the more important benefits of the statute. Now Georgians will be assured of colliding with persons with insurance coverage providing for compensation up to the "aggregate minimum limit of \$5,000" per insured person for economic loss, *i. e.*, medical expenses, loss of earnings of income, funeral services and expenses incurred in obtaining services from others which the injured person may have performed for the benefit of "his or her household."

The survivability of this coverage or action is limited to the spouse or dependent children of a deceased insured person.³ Payment of the benefits may, however, be made to the person having legal custody of the dependent child or children.⁴

Payments of benefits are to be made monthly as the loss accrues. In the event the insurer fails to pay the benefits, the insured may sue to recover same along with a "penalty exceeding" 25% of the amount due and reasonable attorneys' fees. The burden is placed upon the *insurer* to show that the failure or refusal to pay was in good faith in order to avoid payment of the penalty and attorneys' fees.⁵ It will be most interesting to observe the court's application of this portion of the Act and compare such applications to the decisions construing Ga. Code Ann. §50-1206 (Rev. 1974). Hopefully, this new statute will mean what it says.

These benefits payable under the Act are not reduced by the payment of other benefits such as workmen's compensation, hospitalization benefits or uninsured motorists coverage benefits.⁶ However, if a person is entitled to economic loss benefits under the Act, he is precluded from recovering same in an action for damages against a tortfeasor.⁷ Unless the injury sustained is a serious injury as defined therein, an insured is exempt for payment of damages for non-economic loss.⁸

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1. GA. CODE ANN. §56-3401b (Supp. 1974).

2. GA. CODE ANN. §56-3412 (Supp. 1974); GA. CODE ANN. §56-9915.2 (Supp. 1974).

3. GA. CODE ANN. §56-3403b(4) (Supp. 1974).

4. *Id.*

5. GA. CODE ANN. §56-3406b (Supp. 1974).

6. GA. CODE ANN. §56-3409b (Supp. 1974).

7. GA. CODE ANN. §56-3410b (Supp. 1974).

8. GA. CODE ANN. §56-3402b(j) (Supp. 1974).

Persons occupying a motor vehicle knowing the same to be stolen, owning a vehicle not insured under the Act, and operating a motorcycle or bicycle are not entitled to benefits thereunder.⁹ Why these persons are not included is not known, but hopefully it is not the same public policy which places them all in this category. The Act applies to accidents and injuries occurring after March 1, 1975.¹⁰

II. ATTORNEYS' FEES

Two cases during the survey period illustrate the confusion of the law with respect to Georgia Code Ann. §56-1206 (Rev. 1971)¹¹ dealing with penalties for bad faith of insurance companies in not paying a claim upon demand. In the first, *Key Life Insurance Co. of South Carolina v. Mitchell*,¹² the jury's verdict awarding the penalty and attorneys' fees was allowed to stand.

The other, *Interstate Life and Accident Insurance Co. v. Brown*,¹³ is particularly interesting because of the dissenting opinion of Judge Evans cataloging all the instances and situations in which penalties or attorneys' fees under Ga. Code Ann. §56-1206 (Rev. 1971) *may not* be awarded. There, the majority, after stating "[t]he evidence supports the verdict and the trial court did not err in denying defendant's motion for a judgment n. o. v. or its motion for a new trial on this ground,"¹⁴ directed that attorneys' fees awarded by the jury be written off, stating:

The court erred in authorizing the jury to award attorney fees for bad faith refusal to pay. The evidence was circumstantial and did not demand

9. GA. CODE ANN. §56-3408b (Supp. 1974).

10. GA. LAWS, 1974, p. 113 at 124.

11. GA. CODE ANN. §56-1206 (Rev. 1971) provides:

In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 25 per cent. of the liability of the insurer for the loss and all reasonable attorney's fees for the prosecution of the case against the insurer. The amount of such reasonable attorney's fees shall be determined by the trial jury and shall be included in any judgment which is rendered in such action: Provided, however, such attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of such services, based on the time spent and legal and factual issues involved, in accordance with prevailing fees in the locality where such suit is pending: Provided, further, that the trial court shall have the discretion, if it finds such jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend such portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this section in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and his attorney for the services of such attorney in the action against the insurer.

12. 129 Ga. App. 192, 198 S.E.2d 919 (1973).

13. 130 Ga. App. 850, 204 S.E.2d 755 (1974).

14. *Id.* at 851, 204 S.E.2d at 756.

a finding for the plaintiff. *Boston-Old Colony Ins. Co. v. Warr*, 127 Ga. App. 264(2) (193 SE2d 624), *Home Indemnity Co. v. Godley*, 122 Ga. App. 356, 363 (177 SE2d 105). Though the evidence indicated that Grady could have died from a blow to the head, nonetheless the reason for his falling off the bench prior to suffering the blow remains unexplained.¹⁵

The question was whether the insured had died "through external, violent accidental means" after falling off a bench on which he was dozing.

The matter of attorneys' fees in divorce actions came before the court in *Margeson v. Givens*,¹⁶ where the attorney-plaintiff sought to recover fees awarded him on behalf of a wife he had represented in a divorce action. In construing Ga. Code Ann. §30-202.1 (Rev. 1969),¹⁷ the court held that it did not authorize an attorney in his own name to enforce an award of attorneys' fees made to his client. This decision is in accord with the former law and the statute which was in effect prior to 1967.¹⁸

An award of attorneys' fees under Georgia Code Ann. §20-1404 (Rev. 1965)¹⁹ was held to be unauthorized in *Palmer v. Howse*.²⁰ The court stated that the majority view of the cases decided under this provision is as follows.

A defendant without a defense may still gamble on a person's unwillingness to go to the trouble and expense of a lawsuit; but there will be, as in any true gamble, a price to pay for losing. We do not believe the trial courts will find any difficulty in determining whether a genuine dispute exists - whether of law or fact, on liability or amount of damages, or on any comparable issue. Where none is found, it may authorize the jury to award the expenses of litigation.²¹

In *Thibadeau Co. v. McMillan*²² an award of attorneys' fees under the bad faith provisions of Ga. Code Ann. §20-1404 (Rev. 1965)²³ was allowed

15. *Id.*

16. 231 Ga. 552, 203 S.E.2d 186 (1974).

17. GA. CODE ANN. §30-202.1 (Rev. 1969) provides:

The grant of attorneys' fees as a part of the expenses of litigation made at any time during the pendency of the litigation, whether the action be for alimony, divorce and alimony, or contempt of court arising out of either an alimony case or a divorce and alimony case, shall be a final judgment as to the amount granted, whether the grant be in full or on account, and may be enforced by attachment for contempt of court or by writ of fieri facias, whether the parties subsequently reconcile or not: Provided, that nothing contained herein shall be construed to mean that attorneys' fees shall not be awarded at both the temporary hearing and the final hearing.

18. See *White v. Bowen*, 223 Ga. 94, 153 S.E.2d 706 (1967).

19. GA. CODE ANN. §20-1404 (Rev. 1965) provides:

The expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

20. 133 Ga. App. 619, 212 S.E.2d 2 (1974).

21. *Id.* at 620-21, 212 S.E.2d at 4.

22. 132 Ga. App. 842, 209 S.E.2d 236 (1974).

23. See note 19 *supra*.

to stand. The court commented that "bad faith" in this statute means "bad faith in the transaction out of which the cause of action arose."²⁴

III. EQUITY

*Keith v. Keith*²⁵ was a suit to set aside a divorce decree and property settlement agreement. Plaintiff had requested a jury trial in the complaint but waived trial by jury at the rule nisi hearing before the judge. Defendant had not requested jury trial relying on plaintiff's request but did so at the rule nisi hearing. The trial judge denied the defendant's motion and proceeded to hear the case sitting as judge and jury. The supreme court affirmed the action of the trial judge stating:

There is no constitutional right to a jury trial in equity cases. Such a right, so far as it exists, is statutory in nature . . . [I]t is clear that there was no error in the trial judge proceeding to hear the matter sitting as both judge and jury.²⁶

The supreme court judicially determined in *Bettis v. Leavitt*²⁷ the way to get the attention of a recalcitrant defendant who deliberately sought to evade service of process and who had been successful in thirteen attempts to serve him by apparently outwitting a private investigator employed and appointed to perfect service. In this suit seeking the appointment of a receiver to take charge of the partnership assets the court stated:

One of such ways is the appointment of a temporary receiver for the assets within the jurisdiction of the court. Such action usually brings a response, and the responding party then has every right to show in the trial court that the appointment of a temporary receiver was not legally justified and should not be continued.²⁸

The rule that an action to enjoin and foreclose under power of sale must be brought in the county of the residence of the defendant, and not the county in which the land being foreclosed upon lies, was recited in *Nylen v. Barbaris*²⁹ by the Georgia Supreme Court.

*McDonald v. McDonald*³⁰ is an interesting case because of the situation out of which it arose and the supreme court's approach to the issues presented to it. The plaintiff sought an injunction to prevent her ex-husband's parents from enforcing a note to them signed by her and her ex-husband. In the decree in the prior divorce action her ex-husband was ordered to pay the note. Plaintiff alleged that she was entitled to equitable relief due to

24. 132 Ga. App. at 843, 209 S.E.2d at 237.

25. 231 Ga. 230, 200 S.E.2d 891 (1973).

26. *Id.* at 231, 200 S.E.2d at 892.

27. 230 Ga. 607, 198 S.E.2d 296 (1973).

28. *Id.* at 609, 198 S.E.2d at 297.

29. 232 Ga. 79, 205 S.E.2d 303 (1974).

30. 232 Ga. 190, 205 S.E.2d 850 (1974).

her ex-husband and his parents engaging in a "fraudulent combination to oppress" her.³¹ The trial court granted an interlocutory injunction restraining and enjoining her "oppressors" from proceeding with the suit on the note. The Supreme Court of Georgia reversed. The divorce suit was held to be binding on strangers only as to the status of the parties. The court further commented that no adequate explanation as to why her legal remedy of contempt against the ex-spouse would not be adequate. It was not decided whether her assertions of oppression were sufficient to warrant the equitable relief prayed or whether the grant of the temporary injunction was a proper exercise of discretion by the trial judge.

The plaintiff-subcontractor in *Bishop v. Flood*³² who failed to file a lien against the property upon which improvements were made was caught in the claws of the equitable maxim, "Equity aids the vigilant, not the slothful," and his suit against the owner of the property grounded upon unjust enrichment was held to be properly dismissed.

The Supreme Court of Georgia determined in *Wiley v. Wiley*³³ that it and not the Georgia Court of Appeals has jurisdiction of an appeal from a judgment involving solely statutory partition proceedings. Such an action is one "respecting title to land and jurisdiction based upon Article VI, Section II, Paragraph IV of the Constitution of the State of Georgia."³⁴

IV. PRACTICE

The question of the sufficiency of objections to the trial court's charge was considered in *Smith v. Tri-State Culvert Manufacturing Co.*³⁵ The majority held that it was sufficient to identify the portion of the charge to which objection is made, stating that it is no longer required to point out to the court what it should have charged. However, the dissenting opinion by Presiding Judge Pannell, citing the requirements of Georgia Code Ann. §70-207(a) (Supp. 1974),³⁶ provides the better guide for the practitioner by stating that

one objecting to a charge must state "distinctly the matter to which he objects and the grounds of his objection."³⁷

31. *Id.* at 191, 205 S.E.2d at 851.

32. 133 Ga. App. 804, 212 S.E.2d 443 (1975).

33. 233 Ga. 824, 213 S.E.2d 682 (1975).

34. GA. CONST. art. VI, §II, para. IV (1945), GA. CODE ANN. §2-3704 (Rev. 1973).

35. 131 Ga. App. 836, 207 S.E.2d 203 (1974).

36. GA. CODE ANN. §70-207(a) (Supp. 1974) provides:

Except as otherwise provided in this section, in all civil cases, no party may complain of the giving or the failure to give an instruction to the jury, unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury, and objection need not be made with the particularity of assignments of error (abolished by this law) and need only be as reasonably definite as the circumstances will permit

37. 131 Ga. App. at 839, 207 S.E.2d at 206.

The plaintiff in a personal injury case, *Cox v. LeRoy*,³⁸ was awarded \$20,000 for pain and suffering and \$5,000 for medical expenses. Defendant filed a motion to amend or set aside judgment, seeking to strike the \$5,000 figure and substitute \$1,520, contending that the former figure was in excess of the actual amount of medical expenses introduced into evidence. Defendant's position was that this was a "mere irregularity." The motion was granted *instanter* without hearing. The court of appeals reversed, reasoning as follows:

Every court has power to amend and control its processes and orders so as to make them conform to law and justice, and to amend its records to conform to the truth. Code § 24-104(6). But when founded on verdicts of a jury, and not the acts of the judge, the court may not amend the judgment, as was done here, so as not to follow the verdict. The "defendant is relegated to his remedy of a motion for new trial, or to a proceeding in the nature of a motion for new trial," rather than a motion to amend the judgment. *Cook v. Attapulgus Clay Co.*, 52 Ga. App. 610(1) (84 SE 334). See also *Ga. R. & Electric Co. v. Hamer*, 1 Ga. App. 673 (58 SE 54); *Grogan v. Deraney*, 38 Ga. App. 287, 290 (143 SE 912); *James v. Douglasville Banking Co.*, 26 Ga. App. 509(3) (106 SE 595); *Hunter v. Gillespie*, 207 Ga. 574, 575 (63 SE2d 404); *Martin v. General Motors Corp.*, 226 Ga. 860, 862 (178 SE2d 183). Accordingly, the court erred in amending the judgment based on a verdict here without a change of the verdict in granting a new trial.³⁹

Seemingly hard and fast rules regarding the time for making a motion for directed verdict were established in *Gleaton v. City of Atlanta*.⁴⁰ Defendant's counsel made his motion at the close of the plaintiff's evidence and the court withheld its ruling and required defendant to present his evidence. Forms for special verdicts were agreed upon and submitted to the jury, and the jury was instructed that if damages were found there would be further proceedings before the jury. A special verdict was returned for the plaintiff. Defendant then made a second motion for directed verdict. The jury was released for the day and defendant's motion was granted. Held:

Here, no motion for directed verdict was made at the close of the case or at the close of all of the evidence; but after the jury had returned the aforementioned special verdicts, the motion for directed verdict was made and granted. When said motion was made, the jury had already decided each and every question in the case except as to the exact amount of damages to which plaintiff was entitled. Inasmuch as the trial court elected to submit the case to the jury for decision on certain vital questions, acquiesced in by defendant's counsel, this constituted a waiver on defendant's part of his right to move for a directed verdict at the close of all the evidence, as is allowed and provided for in Code Ann. §81A-150.

38. 130 Ga. App. 388, 203 S.E.2d 863 (1973).

39. *Id.* at 388, 203 S.E.2d at 863.

40. 131 Ga. App. 399, 206 S.E.2d 46 (1974).

There are only two places in point of time when a motion for directed verdict may be made, to wit, (1) at the close of plaintiff's evidence; and (2) at the close of all the evidence.⁴¹

However, this rule has been somewhat altered by a more recent decision in *Anderson v. Universal C.I.T. Credit Corp.*,⁴² in which the court, after comparing the federal and state statutory provisions, stated that

it appears logical that the state statute, allowing such a motion to be made "at the close of the case," should be construed so as to allow it to be made anytime prior to the return of a verdict by a jury.⁴³

In *Prattes v. Southeast Ceramics, Inc.*⁴⁴ the appellee sought to invoke the apparently little known and seldom used provisions of Ga. Code Ann. §6-1801 (Rev. 1975)⁴⁵ providing for 10% assessment of damages if the cause is appealed for delay only. Appellee had obtained judgment under the provisions of Ga. Code Ann. §81A-137 (Rev. 1972)⁴⁶ due to the willful failure of appellant to attend the taking of his deposition in that case. After judgment appellee served notice to the appellant-defendant in fi. fa. to appear for post-judgment examination under oath. Appellant filed its "complaint in equity" in the State Court of DeKalb County reciting that it was filed pursuant to Ga. Code Ann. §81A-160(a) (Supp. 1974).⁴⁷ The judgment of the trial court denying appellant's motion was affirmed. Then, after reciting the criterion⁴⁸ for an award under the penalty provisions of Ga. Code Ann. §6-1801 (Rev. 1975) the court further stated:

41. *Id.* at 400-01, 206 S.E.2d at 48.

42. 134 Ga. App. 931, 216 S.E.2d 719 (1975).

43. *Id.* at 933, 216 S.E.2d at 721.

44. 132 Ga. App. 584, 208 S.E.2d 600 (1974).

45. GA. CODE ANN. §6-1801 (Rev. 1975) provides:

Ten per cent. damages may be awarded by the appellate court upon any judgment for a sum certain, which has been affirmed, when in their opinion, the cause was taken up for delay only, and it shall be so entered in the remittitur.

46. GA. CODE ANN. §81A-137(b)(2)C (Rev. 1972), under the heading, "*Sanctions by court in which action is pending,*" provides for

[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party

47. GA. CODE ANN. §81A-160(a) (Supp. 1974) provides:

A judgment void on its face may be attacked in any court by any person. In all other instances, judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods hereinafter prescribed.

48. [W]hen a motion for damages is filed, we will carefully examine the record and will pass upon the motion in the light of the entire history of the case as there presented. If after reviewing the whole matter we believe that the plaintiff in error is presenting a bona fide contest over a colorable matter, though his view of the law may not in fact be well founded, or that he is seeking a ruling upon an open or doubtful question, damages will be refused. But when the record discloses that the plaintiff in error has no just case, that no new question of law is involved, and the record is full of those things which every judge and every lawyer recognizes as indicia of an attempt to fight merely for time, justice demands that we overcome

In the instant case, our examination leads us to conclude that this appeal was not filed for delay purposes, a view fortified by the extent of the appellant counsel's argument and research. Accordingly, the motion for assessment of damages is denied.⁴⁹

In *Farris v. United States*,⁵⁰ a case brought under Ga. Code Ann. §37-1503 (Rev. 1962)⁵¹ "classic statutory interpleader" as distinguished from Ga. Code Ann. §81A-122 (Rev. 1972)⁵² which is more liberal than the prior statute, the requirements for both remedies were discussed, but the court held that neither allow interpleader where there is failure to show multiple claims against petitioner, against same funds; which may expose petitioner to multiple liability. The "diverse claimants seeking different remedies" requirements of the statute were not met and the complaint was properly dismissed by the trial court.

A case to set aside a deed must be brought in the county where the land is and service may be made by publication if both defendants reside outside the state. This rule is espoused in *Hall v. Hall*.⁵³

The meaning of "costs in the appellate court" in Ga. Code Ann. §6-1704 (Rev. 1975)⁵⁴ was the issue in *Barnett v. Thomas*.⁵⁵ The costs were \$410.80 for the transcript, \$350.50 for trial court costs and sending the record to

any personal hesitancy we may have, and that we add an award of damages to the judgment of affirmance. 132 Ga. App. at 587, 208 S.E.2d at 601-02.

49. 132 Ga. App. at 587, 208 S.E.2d at 602.

50. 230 Ga. 862, 199 S.E.2d 782 (1973).

51. GA. CODE ANN. §37-1503 (Rev. 1962) provides:

Whenever a person shall be possessed of property or funds, or owe a debt or duty, to which more than one person shall lay claim of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead. If the person bringing such action shall have to make or incur any expenses in so doing including attorney's fees, the amount so incurred shall be taxed in the bill of costs, under the approval of the court, the court in its discretion determining the amount of the attorney's fees, and shall be paid by the parties cast in the suit as other costs are now paid.

52. GA. CODE ANN. §81A-122(a) (Rev. 1972) provides:

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this section supplement and do not in any way limit the joinder of parties permitted in section 81A-120.

53. 230 Ga. 873, 199 S.E.2d 798 (1973).

54. GA. CODE ANN. §6-1704 (Rev. 1975) provides:

The attorney representing the plaintiff's cause shall, in all cases, be responsible for the costs in the appellate court. If there is a judgment of reversal, the plaintiff in error shall be entitled to a judgment for the amount of such costs against the defendant in error, as soon as the remittitur is returned to the court below.

55. 129 Ga. App. 583, 200 S.E.2d 327 (1973).

the appellate court, and \$30.00 for statutory costs due the state in the court of appeals. It was held that since both a transcript and clerk's record are required for an effective appeal, both are included by the statute. The claimant was accordingly awarded the costs in the court of appeals, cost for the transcript and so much of the remaining cost as represented the costs for preparation of the clerk's record which was transmitted to the appellate court. The costs in the trial court were excluded from the award.

In *Snooks v. Factory Square, Inc.*⁵⁶ a letter from the garnishee not complying with statutory requirements in a garnishment action, but which was later amended to fully comply with Ga. Code Ann. §46-301 (Rev. 1974)⁵⁷ was held to be a valid answer. This was decided under Ga. Code Ann. §81A-108(f) (Rev. 1972),⁵⁸ and although the letter was not properly verified in that there were no words of oath, these defects were cured by the amendment. The critically important point was that the plaintiffs were notified of the response of the garnishee, and were not significantly prejudiced by these "errors of form." The dissent of Judge Pannell adopts the position, however, that the letter was a nullity and could not be rendered viable by amendment.

V. DAMAGES — CONTRACT

*Eskew v. Camp*⁵⁹ follows the provisions of Ga. Code Ann. §20-1405 (Rev. 1965),⁶⁰ holding that punitive damages are not recoverable in an action arising ex contractu.

The court of appeals approved as a "true rule of law" the following instructions given by the trial judge in *Ayers Enterprises, Ltd. v. Adams*⁶¹ as to the measure of damages upon the breach of a construction contract:

56. 129 Ga. App. 772, 201 S.E.2d 168 (1973).

57. GA. CODE ANN. §46-301 (Rev. 1974) provides:

In all cases of garnishment, whether the same be based on an attachment or on a suit or judgment, the garnishee shall file his answer stating in what amount he was indebted to the defendant at the date of the service of the summons of garnishment and also in what sum he may have become indebted at any time between such date and the time of the answer thereto, or what property, money or effects belonging to defendant he had in his hands at the time of the service of the summons, or what property, money or effects belonging to the defendant have come into his hands between the time of the service of the summons and the making of his answer. If the garnishee shall be due the defendant any sum for wages, the answer shall also state specifically when the wages were earned by defendant and whether the same were earned a daily, weekly or monthly wages. If the garnishee shall be unable to answer as herein provided, his inability shall appear in his answer, together with all the facts plainly, fully, and distinctly set forth, so as to enable the court to give judgment thereon.

58. GA. CODE ANN. §81A-108(f) (Rev. 1972) provides:

All pleadings shall be so construed as to do substantial justice.

59. 130 Ga. App. 779, 204 S. E. 2d 465 (1974).

60. GA. CODE ANN. §20-1405 (Rev. 1965) provides:

Exemplary damages can never be allowed in cases arising on contracts.

61. 131 Ga. App. 12, 205 S.E.2d 16 (1974).

"[T]he plaintiff would be entitled to recover whatever sum you find to be the difference between the contract price and the reasonable and necessary cost price to the plaintiff to complete the contract — that is, to build the house in accordance with the terms of the original contract, whatever you find that contract to be." He also instructed them that they had the option to find that "the plaintiff ought to recover against the defendant whatever amount you find the plaintiff has been damaged."⁶²

The joinder of a president-employee in an action for breach of contract against the company was determined to be proper on the theory of his negligent performance of obligation to supervise. The basis of this decision in *Howell v. Ayers*⁶³ is Ga. Code Ann. §3-114 (Rev. 1975).⁶⁴

*Radlo of Georgia, Inc. v. Little*⁶⁵ is a case of first impression in that it involves the measure of damages for the loss of future profits from the future sale of unborn livestock. Plaintiff sought damages for breach of an agreement whereby he raised pigs for defendant. Defendant was to furnish gilts, sows, boars, medicines and food, and plaintiff was to raise the pigs until they reached forty pounds in weight. Then they were to be paid for and returned to defendant. The court determined the loss of profits from the venture would be too remote and speculative to be recovered and the proper measure would be the necessary expense plaintiff incurred in raising the pigs. This is the same measure that is applied in situations involving future sales of ungrown crops.

VI. DAMAGES — TORTS

The plaintiff in *Bell v. Sigal*,⁶⁶ the mother of a nine-year-old son, filed two actions against the physician who treated her son prior to his death. One was for wrongful death. The second sounded in contract and sought damages for her grief and mental anguish (solatium) resulting from the boy's death. The second action was dismissed on motion by defendants. The court states that damages for mental anguish of a relation or friend due solely to grief over injury to him are not compensable, either by action in tort or contract. The measure of damages in a death case does not include recovery for solatium.

The following rule applicable to personal injury cases is stated in *Karlan v. Enloe*.⁶⁷

62. *Id.* at 17, 205 S.E.2d at 20.

63. 129 Ga. App. 899, 202 S.E.2d 189 (1973).

64. GA. CODE ANN. §3-114 (Rev. 1975) provides:

A plaintiff may pursue any number of consistent or inconsistent remedies against the same person or different persons until he shall obtain a satisfaction from some of them.

65. 129 Ga. App. 530, 199 S.E.2d 835 (1973).

66. 129 Ga. App. 249, 199 S.E.2d 355 (1973).

67. 129 Ga. App. 1, 198 S. E. 2d 331 (1975).

Where a verdict finding the defendant liable to the plaintiff in damages is authorized "and where, under the uncontradicted evidence the plaintiff's special damages . . . amounted to more than the verdict without even considering any amount for pain and suffering, the verdict was so inadequate as to require a new trial."⁶⁸

That the amount of recovery for wrongful death is not to be diminished by social security benefits is the rule in Georgia as expressed by the court of appeals in *Kerr v. Sims*.⁶⁹

The remedies for fraud resulting in the purchase of an automobile are the subject of *Central Chevrolet v. Campbell*⁷⁰ and *City Dodge, Inc. vs. Gardner*,⁷¹ and should be examined to determine the alternatives available to the defrauded purchaser in such a situation.

The measure of damages upon conversion of an automobile for the holder of perfected security interest therein is the market value of the automobile at the time of the conversion according to the decision in *Cooper v. Citizens Bank of Gainesville*.⁷²

In *Hickman v. Frazier*⁷³ the rule that expenses of litigation, including attorneys' fees as provided for in Ga. Code Ann. §20-1404 (Rev. 1965), cannot be recovered by a defendant is remembered and restated by the court of appeals.

An action for damages for contamination of underground water is the subject of *North Georgia Petroleum Co. v. Lewis*.⁷⁴ The action was grounded upon the negligence in providing, installing and failing to remedy a defect in gasoline tanks on property adjacent to that of the plaintiff. The evidence showed a leakage of gas from the tanks and contamination of plaintiff's wells. Apparently for the first time in Georgia such negligence was held to be actionable. The court specifically stated that Georgia Code Ann. §105-1408 (Rev. 1968)⁷⁵ does not preclude an action for injury to underground water based upon negligence. Plaintiff was allowed to recover damages based upon the difference in market value of his property with and without water.

In *Southern Mutual Investment Corp. v. Langston*⁷⁶ the plaintiff, owner of property adjacent to a stream at a lower point than defendant, sought to recover damages because of the alteration of the flow of the stream by

68. *Id.* at 4, 198 S.E.2d at 333.

69. 130 Ga. App. 54, 202 S.E.2d 244 (1973).

70. 129 Ga. App. 30, 198 S.E.2d 362 (1973).

71. 130 Ga. App. 502, 203 S.E.2d 729 (1973).

72. 129 Ga. App. 261, 199 S.E.2d 369 (1973).

73. 128 Ga. App. 552, 197 S.E.2d 441 (1973).

74. 128 Ga. App. 653, 197 S.E.2d 437 (1973).

75. GA. CODE ANN. §105-1408 (Rev. 1968) provides:

The course of a stream of water underground, and its exact condition before its first use, are so difficult of ascertainment, that trespass may not be brought for any supposed interference with the rights of a proprietor.

76. 128 Ga. App. 671, 197 S.E.2d 775 (1973).

defendant. Plaintiff contended that defendant's alteration of the terrain on his property increased the flow of water in the stream, resulting in damage to plaintiff's properties caused by erosion from the excessive amount of water discharged into the stream. The comment of the court on the wrong complained of by plaintiff was as follows:

The principle upon which we rule this case is, that water having a time relation, as well as a space relation, both of them being fixed by nature, there is no more right in an adjacent proprietor to alter the one than the other. If the time relation of the stream is so altered that the effect of the water upon the lower tract is injuriously different from what it was by the natural flow of the stream, then a wrong has been done to the proprietor of the lower tract. We think that the owner of water has no more right artificially to project it forward on another man's land than he has to push it back upon land in his rear; and if by so doing he causes damage, he ought to answer for it.⁷⁷

Evidence of diminuation of value of plaintiff's property resulting from defendant's tortious interference with the flow of the stream was not admitted. Plaintiff introduced evidence only as to the cost of repair. This measure of damages was approved as "a realistic equitable method of assessing the damages"⁷⁸ and held to come within the exception to the above stated general rule.

In *Southern R.R. v. A. O. Smith Corp.*⁷⁹ the court of appeals held that the 1972 statutes changing the Georgia law on contribution and indemnity⁸⁰ apply to those cases in which the "injury or event on which liability depends" occurs after the effective date of the act.⁸¹ This was construed to mean the date of the plaintiff's cause of action arose, rather than the date the claim was compromised and paid by one of the tortfeasors. Query: does not the joint tortfeasor's right to contribution arise upon payment of the claim?

77. *Id.* at 673, 197 S.E.2d at 777.

78. *Id.* at 675, 197 S.E.2d at 778.

79. 134 Ga. App. 219, 213 S.E.2d 903 (1975).

80. GA. CODE ANN. §105-2012(1) (Supp. 1974), which provides:

Where the tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if they had been jointly sued. Without the necessity of being charged by suit or judgment, the right of contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death, and release therefrom.

GA. CODE ANN. §20-1206 (Supp. 1974), which provides:

Without the necessity of being charged by suit or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death, and release therefrom.

81. The effective dates of GA. CODE ANN. §105-2012 (Supp. 1974) and GA. CODE ANN. §20-1206 (Supp. 1974) are March 7, 1972, and March 10, 1966, respectively.

In the personal injury case of *Atlanta Transit System, Inc. v. Robinson*⁸² the verdict was attacked as excessive. The court expressed the following opinion:

An excessive or inadequate verdict constitutes a mistake of fact rather than of law. It addresses itself to the discretion of the trial judge who saw the witnesses and heard the testimony. This court is a court for the correction of errors of law only, and this court's jurisdiction is confined to the question of whether the trial court abused his discretion in overruling the motion for a new trial on this ground. [cits.]. In the present case, where the evidence most favorable to the plaintiff shows painful and permanent injuries with loss of physical function, it cannot be said that the verdict is excessive as a matter of law.⁸³

This may be the sound of the future on this point as the appellate courts seem more and more inclined to deny relief of this nature. It is hard to understand why the same reasoning is not applied upon review of attorneys' fees awards.

*Porterfield v. Gilmer*⁸⁴ is a "case involving legal principles generally referred to as 'estoppel by judgment,' 'collateral estoppel,' 'estoppel by verdict,' or 'res judicata.'"⁸⁵ The Porterfields, husband and wife, sued Gilmer's master in federal court for injuries received in an automobile accident. The husband-Porterfield recovered nothing on his claim. Gilmer, the servant, was not made a party to the federal suit, but was sued by the husband-Porterfield in the instant action. Gilmer's first defense was:

Res judicata and/or estoppel by judgment and/or the law of the case and/or the fact that all of these matters were either previously litigated or could have been litigated previously.⁸⁶

The trial court granted Gilmer's motion for summary judgment as to this defense. The court commented that the relationship of master and servant does necessarily constitute the priority required before one can assert the defense of res judicata or estoppel by judgment. A master may assert these defenses even though he was not a party to the action against the servant. The explanation is that these defenses are available due to the master's liability being derivative to that of the servant. However, such is not the case when the second suit is against the servant who was not a party to the prior suit against the master. Accordingly, the servant may not assert the defense of res judicata or estoppel by judgment as a bar to subsequent action against him. The court reversed the grant of summary judgment in favor of Gilmer, going further to state that there was no mutuality of

82. 134 Ga. App. 170, 213 S.E.2d 547 (1975).

83. *Id.* at 171, 213 S.E.2d at 549.

84. 132 Ga. App. 463, 208 S.E.2d 295 (1974).

85. *Id.* at 464, 208 S.E.2d at 296.

86. *Id.*

estoppel present between Gilmer and Porterfield and that the mutuality rule precludes Gilmer from taking advantage of res judicata or estoppel by judgment. It should be noted that throughout this decision the court failed to recognize any distinction between the concepts of res judicata or estoppel by judgment. The dissenting opinion of Judge Stolz appears to be well reasoned, well written and more consistent with prior law regarding the application of the doctrine of res judicata.

In *Bennett v. Haley*⁸⁷ the court of appeals ruled that medical and hospital bills paid by Medicaid⁸⁸ are recoverable by a plaintiff.

The collateral source rule permits an injured party to recover damages from a defendant notwithstanding that the plaintiff received compensation from other sources.⁸⁹

This established principle does not permit a tortfeasor to take advantage of medical expenses paid by others.⁹⁰ Accordingly, the collateral source rule prevents evidence as to payment of Medicaid to be proved by a defendant so as to reduce a recovery by plaintiff, and the fact that the collateral source is a government sponsored program for the indigent is insignificant.⁹¹

In *Simmons v. Brock*⁹² a verdict for the plaintiff in a physical assault case for \$1.00 was found inadequate.

Since the evidence authorized the finding of the jury establishing the liability of the defendant, and the undisputed evidence showed actual damages to the plaintiff resulting from the injuries sustained, a verdict in favor of the plaintiff for less than the actual damages proved was grossly inadequate.⁹³

The plaintiff in *Barnes v. Cornett*⁹⁴ presented evidence as to her lost earnings up to the time of filing her complaint and evidence from which it could be concluded that her capacity to labor was decreased 15% due to the injuries from the auto collision out of which the action arose. The court held that this "proof . . . was not sufficient to create justiciable issue as to lost earning capacity,"⁹⁵ explaining that lost earning capacity and lost ability to labor are decidedly different matters. Lost earning capacity must be proven with reasonable certainty, whereas lost ability to labor is an element of damage in the nature of pain and suffering and is measured by the enlightened consciences of impartial jurors.

87. 132 Ga. App. 512, 208 S.E.2d 302 (1974).

88. 42 U.S.C.A. §1396a(a)25 (Rev. 1974).

89. 132 Ga. App. at 522, 208 S.E.2d at 310.

90. *Id.*

91. *Id.* at 524, 208 S.E.2d at 311.

92. 131 Ga. App. 275, 205 S.E.2d 716 (1974).

93. *Id.* at 276, 205 S.E.2d at 717.

94. 134 Ga. App. 120, 213 S.E.2d 703 (1975).

95. *Id.* at 121, 213 S.E.2d at 705.

*Gilmore v. Fulton-DeKalb Hospital Authority*⁹⁶ is another case of first impression in Georgia. In this case, the plaintiff brought a wrongful death action for the full value of her daughter's life. She recovered from the defendant and later executed satisfaction of the judgment of record. She then brought the action herein against the Hospital Authority seeking recovery for the full value of her daughter's life. The court affirmed the trial court's grant of judgment on the pleadings in favor of the defendant, reasoning that the wrongful death statute provides only one cause of action and that the satisfaction of the prior judgment extinguished it.

In *Blanchard v. Westview Cemetery, Inc.*⁹⁷ a grave wrong was allegedly committed and a tort action was brought by a widow against the cemetery for the "unauthorized and unlawful"⁹⁸ moving of her late husband's body from one burial site to another. She obtained judgment for \$15,000 actual and \$85,000 punitive damages. There is included in the court's opinion a discourse on the law of Georgia regarding exemplary and vindictive damages. The application of the pertinent statutes⁹⁹ is thoroughly discussed. The specific problem presented to the court was whether the plaintiff suing for an injury to "wounded feelings" could recover additional exemplary damages. The court's resolution of this question was stated thusly:

Obviously, the plaintiff cannot recover compensatory damages for injury to her peace, feelings and happiness (mental pain and suffering alone arising out of a wilful tort) and exemplary damages for "wounded feelings." This would amount to a recovery of 'double damages' which is not allowed. *Southern R. Co. v. Jordan*, 129 Ga. 665, supra; *Johnson v. Morris*, 158 Ga. 403 (123 SE 707). However, the plaintiff may seek compensatory damages for injury to her peace, feelings and happiness (mental pain and suffering alone arising out of a wilful tort) and exemplary damages to *deter the wrongdoer*.¹⁰⁰

96. 132 Ga. App. 879; 209 S.E.2d 676 (1974).

97. 133 Ga. App. 262, 211 S.E.2d 135 (1974).

98. *Id.* at 262, 211 S.E.2d at 137.

99. GA. CODE ANN. §105-2001 (Rev. 1968), which provides:

Damages are given as compensation for the injury done, and generally this is the measure where the injury is of a character capable of being estimated in money. If the injury is small, or the mitigating circumstances are strong, nominal damages only are given.

GA. CODE ANN. §105-2002 (Rev. 1968), which provides:

In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.

GA. CODE ANN. §105-2003 (Rev. 1968), which provides:

In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed. The verdict of a jury in such case should not be disturbed, unless the court should suspect bias or prejudice from its excess or its inadequacy.

100. 133 Ga. App. at 271, 211 S.E.2d at 142.

The Court of Appeals distinguishes use and abuse of process actions in *Goodwin Agency, Inc. v. Chesser*¹⁰¹ as follows:

Generally, malicious *use* of legal process implies an ulterior motive in procuring the issuance of process, whereas abuse of legal process involves an improper use after its issuance. In malicious use of legal process cases, it is incumbent upon the complaining party to show a successful termination of the previous litigation. Such prerequisite of a successful termination does not exist in an action for malicious *abuse* of process There is a malicious abuse of process where a party employs process legally and properly issued, wrongfully and unlawfully for a purpose which is not intended by law to effect; and for such malicious abuse of civil or criminal process an action will lie against the plaintiff or the officer responsible for the abuse.¹⁰²

VII. MISCELLANEOUS

The supreme court has recognized in *Georgia Power Co. v. Bray*¹⁰³ a right of action under the Georgia Constitution¹⁰⁴ in an owner of property for damages resulting from the condemnation of continuous property not the subject of the taking by condemnation.

Consequential damages to a contiguous tract of land having a different ownership from that in which the taking occurs may be real and may in fact exist, but a separate owner's claim for consequential damages to his land contiguous to the tract where the taking occurs cannot be asserted in a condemnation action.¹⁰⁵

The United States Supreme Court reversed the Georgia Supreme Court in *North Georgia Finishing Corp. v. Di-Chem, Inc.*,¹⁰⁶ holding the Georgia statute authorizing prejudgment issue of garnishments¹⁰⁷ unconstitutional. In so doing the Court continued to vacillate on its case by case approach to problems of procedural due process. Either in response or anticipation of the decision in *Di-Chem*, the Georgia legislature passed a new act in 1975 which includes a number of prerequisites to garnishment.¹⁰⁸ This new statute was apparently based upon the Louisiana statute held to be constitutionally permissible in *Mitchell v. W. T. Grant Co.*¹⁰⁹ There are, however, some significant differences in the two statutory schemes and these may in turn make the difference between the Georgia statute being held consti-

101. 131 Ga. App. 686, 206 S.E.2d 568 (1974).

102. *Id.* at 688-89, 206 S.E.2d at 570.

103. 232 Ga. 558, 207 S.E.2d 442 (1974).

104. GA. CONST. art. I, §III, para. I (1945), GA. CODE ANN. §2-301 (Rev. 1973).

105. 232 Ga. 558, 207 S.E.2d 442 (1974).

106. 419 U.S. 601 (1975).

107. GA. CODE ANN. §46-101 (Rev. 1974).

108. Ga. Laws, 1975, p. 1291.

109. 416 U.S. 600 (1974).

tutional or unconstitutional in the future due to the possible effect of *Di-Chem* upon *Mitchell's* holding.

A similar problem was presented to the Georgia Supreme Court in *Ruff v. Lee*,¹¹⁰ where the court held that a sale of real estate under the powers of sale in a deed to secure debt was not violative of procedural due process standards in spite of the fact that the Georgia statute incorporated therein did not provide for a hearing prior to the sale. The holding in this case will very probably be subject to question in view of recent federal decisions dealing with this specific problem.¹¹¹

110. 230 Ga. 426, 197 S.E.2d 376 (1973).

111. See *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975); *Law v. U.S. Dep't of Agriculture*, 366 F. Supp. 1233 (N.D. Ga. 1973); Note, *Constitutional Law — Due Process — Louisiana Ex Parte Sequestration Procedure Held Constitutional*, 26 MERCER L. REV. 325 (1974).

